ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

CHARLAYNE O'BRIEN, Employee, Claimant, v. CENTRAL PENINSULA GENERAL, Employer, and WAUSAU UNDERWRITERS INSURANCE COMPANY and ALASKA NATIONAL INSURANCE COMPANY, Insurers, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 200701733M AWCB Decision No. 17-0005 Filed with AWCB Anchorage, Alaska on January 19, 2017

Central Peninsula General Hospital's (Employer) October 27, 2016 petition to dismiss and Charlayne O'Brien's (Employee) October 31, 2016 petition for reconsideration or modification of a Board Designee's discovery order and for protective order were heard in Anchorage, Alaska on December 28, 2016. The hearing date was selected on November 22, 2016. Employee appeared telephonically and testified. Attorney Vicki Paddock appeared and represented Employer and workers' compensation insurer Alaska National Insurance Company (Alaska National). Attorney Nora Barlow appeared and represented Employer and workers' compensation insurer Wausau/Liberty Mutual Insurance Company (Liberty). Vicki Sims appeared telephonically and testified for Employee. The record closed at the conclusion of the hearing on December 28, 2016.

ISSUES

Liberty contends Employee's October 22, 2008 claim should be dismissed as a sanction for failure to comply with a Board Designee's order requiring Employee to respond to Liberty's August 4, 2016 discovery request. Liberty contends Employee is communicating with her treating physician in effort to influence the outcome of this case. Liberty seeks disclosure of those communications.

Employee contends she does not necessarily oppose Employer's August 4, 2016 discovery request, but she has not had enough time to respond. Employee opposes dismissal of her claim.

1) Should Employee's October 22, 2008 claim be dismissed as a sanction for failure to comply with a Board Designee's order?

Employee contends the Board Designee abused his discretion in setting a hearing on February 22, 2017, over Employee's objection. Employee contends she needs hundreds of hours to prepare this case for hearing, and requests an order cancelling the February 22, 2017 hearing. Related, Employee seeks an order correcting the October 20, 2016 prehearing conference summary to reflect Employee read a doctor's chart note aloud at the October 20, 2016 prehearing conference.

Liberty and Alaska National contend the Board Designee did not abuse his discretion in setting the February 22, 2017 merits hearing. Both insurers contend Employee's obstruction has caused significance undue delay in this case, and they have incurred large litigation costs. Both insurers oppose cancellation or continuance of the February 22, 2017 hearing.

2) Did the Board Designee abuse his discretion in setting the February 22, 2017 merits hearing?

Employee contends medical conditions prevent her from preparing for her case, including responding to the insurers' discovery requests. Employee seeks an order excusing her from participating in this case entirely for at least three months, at which point her doctor can provide an updated medical status.

Liberty and Alaska National contend Employee has had adequate time to prepare, and that Employee is obstructing and delaying final resolution. Liberty points to a psychiatric employer's

medical examiner (EME) opinion which concludes Employee has Munchausen's syndrome, a psychiatric condition which may be causing Employee to delay resolution of this case indefinitely. Both insurers oppose any additional delay.

3) Should Employee be excused from participation in this case for three months?

SUMMARY OF DECISIONS

On July 15, 2013, *O'Brien v. Central Peninsula General Hospital*, AWCB Decision No. 13-0079 (July 15, 2013) (*O'Brien I*) decided Employee's October 10, 2012 petition requesting additional time to prepare for hearing on her October 22, 2008 claim. *O'Brien I* gave Employee eight months from date of issue to bring her case to hearing.

On November 19, 2013, *O'Brien v. Central Peninsula General Hospital*, AWCB Decision No. 13-0151 (November 19, 2013) (*O'Brien II*) ordered claims and parties in AWCB Case No. 200308494 and AWCB Case No. 200701733 joined under master case number 200701733M, adding Alaska National Insurance Company as a party defendant.

On October 5, 2016, *O'Brien v. Central Peninsula General Hospital*, AWCB Decision No. 16-0082 (October 5, 2016) (*O'Brien III*), decided Employee's February 24, 2016 petition to extend AS 23.30.110(c) deadline and Employee's March 31, 2016 petition to continue all future hearings. *O'Brien III* denied Employee's petition to continue all future hearings, and gave Employee six months from the date of issue to file an affidavit of readiness for hearing (ARH) on her August 19, 2013 claim.

On October 14, 2016, Liberty filed a petition for reconsideration of *O'Brien III*. Liberty's petition contended *O'Brien III* did not address the issue of the running of AS 23.30.110(c) as to Employee's October 22, 2008 claim against Liberty as set forth in the August 9, 2016 prehearing conference summary. On October 25, 2016, *O'Brien v. Central Peninsula General Hospital*, AWCB Decision No. 16-0093 (October 25, 2016) (*O'Brien IV*) granted Liberty's October 14, 2016 petition for reconsideration of *O'Brien III* and gave Employee six months from the date of *O'Brien III* to file an ARH on her October 22, 2008 claim.

FINDINGS OF FACT

All findings in *O'Brien I*, *O'Brien II*, *O'Brien III*, and *O'Brien IV* are incorporated. The following additional relevant facts are undisputed or are established by a preponderance of the evidence:

1) On April 21, 2014, Employee was evaluated by neuropsychologist Paul Craig, Ph.D., on referral from treating physician Marguerite McIntosh, M.D. Dr. Craig opines:

> With regards to "somatization disorder," the current examiner is pleased to announce that all somatization disorders disappeared effective 01/01/14 with the publication of DSM-5. . .
>
> [Employee's] medical history and current presentation suggest that she has experienced a lot of suffering from 2007 forward. To construe all of her suffering as exclusively medical and psychological is to ignore the reality of consciousness. Likewise, to opine that her difficulties are exclusively attributable to psychological phenomena such as the previously diagnosable somatization disorder makes no sense when viewed in the context of her various physical findings and surgical interventions. . . (Craig Report, April 21, 2014).

2) On August 4, 2016, Liberty sent Employee a letter:

> Review of your medical file from Dr. McIntosh's office revealed information provided by you to Dr. McIntosh, including articles pertaining to your medical conditions/treatment/etc., documentation of your medical condition, and letters and/or opinions provided by you to Dr. McIntosh pertaining to your workers' compensation claim.
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> As part of discovery in your claim, I am requesting that you provide copies of all written information (letters, articles, documentation of a medical condition, etc.) that you have provided to any medical provider from whom you have obtained treatment in relation to this workers' compensation claim. . . [within 30 days]." (Letter, August 4, 2016).

3) On August 22, 2016, Employee sent Liberty a letter stating she was unable to respond to the August 4, 2016 letter within 30 days as she was in Georgia for medical care, and did not have access to any of her files or paperwork. Employee stated she would provide these materials when she returned home to Alaska. Employee did not provide a date or timeframe when she could respond to the August 4, 2016 discovery request. (Letter, August 22, 2016).

4) On September 6, 2016, Alaska National filed an ARH on Employee's August 15, 2013 claim. (ARH, September 6, 2016). Employee filed an opposition to the September 6, 2016 ARH on September 15, 2016, along with a four page brief in support. (Opposition, September 15, 2016).

5) On September 19, 2016, Liberty filed a petition to compel Employee to respond to the August 4, 2016 discovery request. (Petition, September 19, 2016).

6) On September 28, 2016, Employee filed an answer in response to Liberty's September 19, 2016 petition. The answer states Employee is in Gainesville, Georgia for medical treatment, and will respond to Liberty's discovery request when she returns home. (Answer, September 28, 2016).

7) On September 29, 2016, the parties attended a prehearing conference. The Board Designee granted Liberty's September 19, 2016 petition to compel and gave Employee until October 21, 2016 to respond to Liberty's August 4, 2016 discovery request. The Designee noted Employee had not provided any documentation showing she was unable to respond to the discovery for medical reasons, and encouraged Employee to do so. (Prehearing Conference Summary, September 29, 2016).

8) On October 12, 2016, Employee was seen by David Weiss, M.D., at SCG Orthopedics in Gainesville, Georgia. The chart note states Employee was being seen post-operatively for bilateral fixation screw removal, and fusion of right and left sacroiliac joints which took place on August 5, 2016. Dr. Weiss also examined Employee regarding a previous posterior fusion on September 9, 2008, disc replacement surgery at L4-5 in 2011 and L5-S1 in 2012, and a prior spinal cord stimulator implant. Dr. Weiss states Employee is doing "markedly better. . ." and is "moving about better." Employee is able to sit for longer periods of time, although she continues to have "very significant limitations." Dr. Weiss notes that while Employee has made significant progress postoperatively, she "continues to have major limitations with regard to ambulation and sitting." At the time, Employee is able to only sit for 30 minutes at one time. Because of this, she is "not able to review and prepare paperwork for her present legal case in Alaska. To do so would jeopardize her recovery." Dr. Weiss feels Employee will continue to have similar restrictions for the foreseeable future and should be reevaluated by physicians in Alaska in three months or later for assessment as to her ability to prepare her Alaska legal case. (Weiss Chart Note, October 12, 2016).

9) On October 20, 2016, the parties attended a prehearing conference. The prehearing conference summary states:

> Based on the 9/6/2016 ARH filed by Employer representative [Alaska National] and over Employee's objection, Designee scheduled a Merits Hearing on Employer's 8/19/2013 WCC. . .
>
> Designee encouraged Employee to abide by the 9/29/2016 Order and respond to Employer representative's [Liberty] 8/4/2016 discovery request by 10/21/2016. (Prehearing Conference Summary, October 20, 2016).

10) On October 27, 2016, Liberty filed a petition to compel Employee to respond to the August 4, 2016 discovery request or alternatively, to dismiss Employee's claims for failure to comply with a Board Designee order to respond. (Petition, October 27, 2016).

11) On October 31, 2016, Employee filed an answer to Liberty's October 27, 2016 petition. The answer states Employee is having difficulty responding to Liberty's discovery since she is still undergoing treatment in Georgia and has limited access to computer, printer, and fax equipment. The answer states Employee recently underwent eight spinal surgeries, can usually only sit for 15 minutes per day, and requests further action in this case cease until Employee can be reevaluated by her doctor in three months. (Answer, October 31, 2016).

12) Also on October 31, 2016, Employee filed a petition for protective order from Liberty's October 27, 2016 petition to compel. The petition also requested modification of the October 20, 2016 prehearing conference summary for "abuse of discretion," and also a general protective order from reviewing any paperwork in this case for three months. (Petition, October 31, 2016).

13) Also on October 31, 2016, Employee filed a document styled "Objection and Request for Modification of Prehearing Conference Summary 10/20/16." The objection makes the following requests and contentions:

- The October 20, 2016 prehearing conference summary should be modified to reflect that Employee has until April 5, 2017 to request a hearing on her claim, according to *O'Brien III*.

- The October 20, 2016 prehearing conference summary should be corrected to reflect that Employee read Dr. Weiss' October 12, 2016 chart note out loud at the prehearing.

- The Board Designee abused his discretion in setting the February 22, 2017 hearing, because Employee has presented evidence in the form of Dr. Weiss' October 12, 2016 opinion that Employee is not ready to prepare.

- The objection states "According to her surgeon's recommendations, employee would be able to sit and prepare for her hearing no sooner than 1/12/17, and possibly later, depending on her Alaska physician's recommendations."

- Because of the complicated nature of this case, Employee needs to review thousands of records to determine what has been filed on medical summaries. Employee believes important documents have still not been filed, which Employee does not have access to while treating in Georgia, and does not have anyone to assist her.

- Since she is not represented by an attorney, Employee is at a physical and legal disadvantage in preparing for and litigating this case. (Objection, October 31, 2016).

14) On November 22, 2016, the parties attended a prehearing conference. The prehearing conference summary states:

> In the interest of fast, fair, and efficient adjudication, Designee waived the ARH requirement regarding [Employer's] and [Employee's] 10/27/2016 and 10/31/2016 Petitions, parties did not object. A Procedural Hearing is scheduled for 12/28/2016. A Merits Hearing is scheduled for 2/22/2017.
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> **Issues Identified for 12/28/2016 Procedural Hearing:**
> Employer's 10/27/2016 Petition to Dismiss
> Employee's 10/31/2016 Petition
> -Response to Employer's Discovery Request
> -Reconsideration/Modification of Designee's 10/20/2016 Order
> -Protective Order Regarding Discovery
> (Prehearing Conference Summary, November 22, 2016).

15) On December 8, 2016, Dr. Weiss wrote a note on a prescription pad stating Employee should remain in Georgia for another one to two months for "specialized SI joint treatment" and that Employee should avoid sitting, bending, or doing paperwork. The note states Employee will be reassessed every two to three weeks. (Weiss Note, December 8, 2016).

16) Employee testified: She is currently in Georgia recovering from sacroiliac revision surgery through physical therapy and does not have access to her medical records. She is attending massage therapy one day per week, physical therapy three days per week, and follow-up

appointments by her surgeon and team specialized in sacroiliac conditions. At the time of the hearing, Employee will have attended 42 physical therapy appointments and nine physician appointments. Most of her legal and medical records are at her home in Alaska, and she has no idea when she will be able to return home. When questioned, Employee could not state with specificity what medical records are still missing from the record of this case, or who the authors of those records might be. (Employee).

17) Employee demonstrates a high degree of ability to prepare for proceedings in this case. Her pleadings, petitions, and objections are well-written and organized, usually typed, show extensive knowledge of the record, and a relatively high degree of familiarity with the Act and regulations. Employee is organized, articulate, coherent, and tracks the proceedings carefully. (Experience, judgment, observations, and inferences from all of the above).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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> (1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter.
> . . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.107. Release of information.** (a) Upon written request, an employee shall provide written authority to the employer, carrier, rehabilitation specialist, or reemployment benefits administrator to obtain medical and rehabilitation information relative to the employee's injury. The request must include notice of the employee's right to file a petition for a protective order with the division and must be served by certified mail to the employee's address on the notice of injury or by hand delivery to the employee. This subsection may not be construed to authorize an employer, carrier, rehabilitation specialist, or reemployment benefits

> administrator to request medical or other information that is not applicable to the employee's injury. . . .
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> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance.** (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.
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> (b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide written authority.
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> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties presents releases that are likely to lead to or documents admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. If a discovery dispute comes before the board for review of a determination by the board's designee ... [t]he board shall uphold the designee's decision except when the board's designee's determination is an abuse of discretion. . . .

AS 23.30.108(c) gives the Board's designee responsibility to decide all discovery issues at the prehearing conference level, with a right of both parties to seek board review. *Smith v. CSK Auto, Inc.*, AWCAC Decision No. 002 (January 27, 2006).

If a party unreasonably refuses to provide information, AS 23.30.108(c) and AS 23.30.135 grant the Board broad, discretionary authority to make orders assuring parties obtain the relevant evidence necessary to litigate or resolve their claims. *Bathony v. State of Alaska, D.E.C.*, AWCB

Decision No. 98-0053 (March 18, 1998). AS 23.30.108(c) and AS 23.30.135 allow for claim dismissal if an employee willfully obstructs discovery, although this sanction "is disfavored in all but the most egregious circumstances." *McKenzie v. Assets, Inc.*, AWCB Decision No. 08-0109 (June 11, 2008).

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The Alaska Supreme Court has stated abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings are "binding for any review of the board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007). Factual findings by the board are reviewed under the substantial evidence standard. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The board has the exclusive authority to determine witness credibility. *Smith v. University of Alaska Fairbanks*, 172 P.3d 782, 788 (Alaska 2007).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

The Alaska Supreme Court encourages "liberal and wide-ranging discovery under the Rules of Civil Procedure." *Schwab v. Hooper Electric*, AWCB Decision No. 87-0322 (December 11, 1987); *citing United Services Automobile Ass'n v. Werley*, 526 P.2d 28, 31 (Alaska 1974); *see also*, *Venables v. Alaska Builders Cache*, AWCB Decision No. 94-0115 (May 12, 1994). Employers must be able to thoroughly investigate workers' compensation claims to verify information provided by the claimant, properly administer claims, effectively litigate disputed claims, and detect any possible fraud. Medical and other releases are important means of doing so. *See, e.g.*, *Cooper v. Boatel, Inc.*, AWCB Decision No. 87-0108 (May 4, 1987). Under AS 23.30.107(a), an employee must, upon written request, release medical and rehabilitation information "relative" to the employee's injury. Evidence is "relative" to the claim where the information sought is reasonably calculated to lead to facts having any tendency to make an issue in a case more or less likely. *Granus v. Fell*, AWCB Decision No. 99- 0016 (January 20, 1999). Based on the policy favoring liberal discovery, "calculated" to "lead to admissible evidence" means more than a mere possibility, but not necessarily a probability, that the information sought by the release will lead to admissible evidence. *Teel v. Thornton Gen'l Contracting*, AWCB Decision No. 09-0091 (May 12, 2009).

Employers have a constitutional right to defend against claims. *Rambo v. VECO, Inc.*, AWCB Decision No. 14-0107 (August 5, 2014), at 8 (citing *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999), at 6, which cited Alaska Const., Art. I Sec. 7). Employers also have a statutory duty to adjust workers' compensation claims promptly, fairly and equitably. *Granus* at 5, citing AS 21.36.120 and 3 AAC 26.010-300.

Exercising the extreme, dismissal sanction has been reversed as an abuse of discretion where the board failed to consider and explain why a sanction short of dismissal would be inadequate to protect the parties' interests. *Erpelding v. R&M Consultants, Inc.*, Case No. 3AN-05-12979 CI

(Alaska Superior Ct., April 26, 2007), reversing *Erpelding v. R&M Consultants, Inc.*, AWCB Decision No. 05-0252 (October 3, 2006). "While we have recognized that the trial court need not make detailed findings or examine every alternative remedy, we have held that litigation ending sanctions will not be upheld unless 'the record clearly indicate[s] a reasonable exploration of possible and meaningful alternatives to dismissal."' *Hughes v. Bobich*, 875 P.2d 749, 753 (Alaska 1994).

The Workers' Compensation Board owes to every applicant for compensation a duty of fully advising her as to all real facts which bear upon her condition and her right to compensation, so far as it may know them, and of instructing her on how to pursue that right under law. *Richard v. Fireman's Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1964). It is long-established that the board applies technical requirements of pleadings filed by *pro se* litigants less stringently than those of lawyers. *Coppe v. Bleicher*, 318 P.3d 369, 376 (Alaska 2014).

> **8 AAC 45.052. Medical summary.** (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim or petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.
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> (b) The party receiving a medical summary and claim or petition shall file with the board an amended summary on form 07-6103 within the time allowed under AS 23.30.095(h), listing all reports in the party's possession which are or may be relevant to the claim and which are not listed on the claimant's or petitioner's medical summary form. In addition, the party shall serve the amended medical summary form, together with copies of the reports, upon all parties.
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> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed. . . .

> **8 AAC 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on

(1) identifying and simplifying the issues;

(2) amending the papers filed or the filing of additional papers;

(3) accepting stipulations, requests for admissions of fact, or other documents that may avoid presenting unnecessary evidence at the hearing;

(4) limiting the number of witnesses, identifying those witnesses, or requiring a witness list in accordance with 8 AAC 45.112;

(5) the length, filing, and date for service of legal memoranda if different from the standards set out in 8 AAC 45.114;

(6) the relevance of information requested under AS 23.30.107(a) and AS 23.30.108;

(7) petitions to join a person;

(8) consolidating two or more cases, even if a petition for consolidation has not been filed;

(9) the possibility of settlement or using a settlement conference to resolve the dispute;

(10) discovery requests;

(11) the closing date for discovery;

(12) the closing date for serving and filing of video recordings, audio recordings, depositions, video depositions, or any other documentary evidence; the date must be at least two state working days before the hearing;

(13) whether a party intends at the time of hearing to seek recusal of a board member, in accordance with AS 44.62.450(c), from participating in the hearing;

(14) whether a party's opening and closing arguments, including a statement of the issues, at the hearing should be longer than permitted by 8 AAC 45.116; or

(15) other matters that may aid in the disposition of the case.

(b) The designee will, in the designee's discretion, conduct prehearings or settlement conferences without the presence of the board members.

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

(e) The board or designee may set a hearing date at the time of the prehearing. The board or designee will set the hearing for the first possible date on the board's hearing calendar unless good cause exists to set a later date. The primary considerations in setting a later hearing date will be whether a speedy remedy is assured and if the board's hearing calendar can accommodate a later date.

(f) The designee may conduct more than one prehearing on a claim or petition.

(g) A party may audio record the prehearing at the party's expense. If a party audio records the prehearing and transcribes the recording, the party must file a copy of the recording and a certified transcript with the board and serve a copy upon the opposing party at least 10 days before a scheduled hearing. If a party fails to timely file the copy of the audio recording and a certified transcript, the board will exclude the transcript or audio recording from the evidence considered in making its decision.

(h) Notwithstanding the provisions of (d) of this section, a party may appeal a discovery order entered by a board designee under AS 23.30.108 by filing with the board a petition in accordance with 8 AAC 45.050 that sets out the grounds for the appeal. Unless a petition is filed under this subsection no later than 10 days after service of a board designee's discovery order, a board designee's discovery order is final.

(i) Notwithstanding the provisions of (d) of this section, a board designee may order reconsideration of all or part of a discovery order entered by the board designee under AS 23.30.108 on the board designee's own motion or on petition of a party. To be considered by the board designee, a petition for reconsideration must set out the specific grounds for reconsideration and be filed with the board in accordance with 8 AAC 45.050 no later than 10 days after service of a board designee's discovery order. The power to order reconsideration expires 20 days after service of a board designee's discovery order. If no action is taken on a petition during the time allowed for ordering reconsideration, the petition is considered denied. If a petition for reconsideration is timely filed with the board, a petition for appeal under (h) of this section must be filed no later than 10 days after service of the reconsideration decision or the date the petition for reconsideration is considered denied in the absence of any action on the petition, whichever is earlier.

8 AAC 45.070. Hearings. (a) Hearings will be held at the time and place fixed by notice served by the board under 8 AAC 45.060(e). A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

(b) Except as provided in this section and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

(1) A hearing is requested by using the following procedures:

(A) For review of an administrator's decision issued under AS 23.30.041(d), a party shall file a claim or petition asking for review of the administrator's decision and an affidavit of readiness for hearing. The affidavit of readiness for hearing may be filed at the same time as the claim or petition. In reviewing the administrator's decision, the board may not consider evidence that was not available to the administrator at the time of the administrator's decision unless the board determines the evidence is newly discovered and could not with due diligence have been produced for the administrator's consideration.

(B) On the written arguments and evidence in the board's case file regarding a claim or petition, a party must file an affidavit of readiness for hearing in accordance with (2) of this subsection requesting a hearing on the written record. If the opposing party timely files an affidavit opposing a hearing on the written record, the board or designee will schedule an in-person hearing. If the opposing party does not timely file an affidavit opposing the hearing on the written record, the board will, in its discretion, decide the claim or petition based on the written record. If the board determines additional evidence or written arguments are needed to decide a claim or petition, the board will schedule an in-person hearing or will direct the parties to file additional evidence or arguments.

(C) For an appearance in-person at the hearing, except for a venue determination, a party must file an affidavit of readiness in accordance with (2) of this subsection requesting an in-person hearing.

(D) On a venue dispute, a party must file a petition asking the board to determine the venue and an affidavit of readiness for hearing on the written

record. In accordance with 8 AAC 45.072, the board will consider the parties' written arguments and evidence in the case file, and an in-person hearing will not be held.

(E) For default under AS 23.30.170, a party shall file a claim and may file the claim together with an affidavit of readiness for hearing.

(2) Except as provided in (1) of this subsection, a party may not file an affidavit of readiness for hearing until after the opposing party files an answer under 8 AAC 45.050 to a claim or petition or 20 days after the service of the claim or petition, whichever occurs first. If an affidavit is filed before the time set by this paragraph,

(A) action will not be taken by the board or designee on the claim or petition; and

(B) the party must file another affidavit after the time set by this paragraph.

(3) If the board or designee determines a hearing should be scheduled even though a party has not filed an affidavit of readiness for hearing, the board or designee will give notice of the hearing in accordance with AS 23.30.110 and 8 AAC 45.060(e).

(c) To oppose a hearing, a party must file an affidavit of opposition in accordance with this subsection. If an affidavit of opposition to a hearing on a claim for compensation or medical benefits is filed in accordance with this subsection, the board or its designee will, within 30 days after the filing of the affidavit of opposition, hold a prehearing conference. In the prehearing conference the board or its designee will schedule a hearing date within 60 days or, in the discretion of the board or its designee, schedule a hearing under (a) of this section on a date stipulated by all the parties.

. . . .

8 AAC 45.074. Continuances and cancellations. (a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;

(H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;

(I) the parties have agreed to and scheduled mediation;

(J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);

(K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

(M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or

(N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) - (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) - (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) - (J) of this subsection. . . .

8 AAC 45.095. Release of information. (a) An employee who, having been properly served with a request for release of information, feels that the information requested is not relevant to the injury must, within 14 days after service of the request, petition for a prehearing under 8 AAC 45.065.

> (b) If after a prehearing the board or its designee determines that information sought from the employee is not relevant to the injury that is the subject of the claim, a protective order will be issued.
>
> (c) If after a prehearing an order to release information is issued and an employee refuses to sign a release, the board will, in its discretion, limit the issues at the hearing on the claim to the propriety of the employee's refusal. If after the hearing the board finds that the employee's refusal to sign the requested release was unreasonable, the board will, in its discretion, refuse to order or award compensation until the employee has signed the release.
>
> **8 AAC 45.110. Record of proceedings.** (a) Evidence, exhibits, or other things received in evidence at a hearing or otherwise placed in the record by board order and any thing filed in the case file established in accordance with 8 AAC 45.032 is the written record at a hearing before the board. . . .

ANALYSIS

1) Should Employee's October 22, 2008 claim be dismissed as a sanction for failure to comply with a Board Designee's order?

Employers have a constitutional right to defend against claims, including the right to thoroughly investigate and gather evidence concerning claims for benefits for which they may ultimately be responsible. *Granus*; *Schwab*; *Rambo*; *Cooper*; AS 23.30.001. Within this bundle of rights is the right to obtain relevant records concerning medical history, previous employment, and other types of benefits sought or collected by an injured worker which may be relevant to the claim or to affirmative defenses. *Id*; AS 23.30.107; AS 23.30.108.

The law requires consideration of lesser sanctions before dismissal is an appropriate remedy for noncompliance with discovery. *McKenzie*; *Erpelding*. Employee appeared at the December 28, 2016 hearing, has filed extensive briefs and legal memoranda, and attended multiple hearings and prehearing conferences. These facts are strong indication of Employee's desire to participate in her case. Dismissal of Employee's claim is not an appropriate remedy at this time. *Id.*; AS 23.30.001; AS 23.30.135.

Liberty sent Employee a discovery request on August 4, 2016 seeking any and all written materials Employee may have sent to her treating physician, Dr. McIntosh. Because such

documents would have been seen or reviewed by Dr. McIntosh and, depending on content, may impact or influence Dr. McIntosh's opinions, the information is arguably relative to any injury Employee is claiming and therefore discoverable. AS 23.30.001; AS 23.30.107; AS 23.30.135; *Granus*. Employee testified and also stated in her answer she is away from home for medical treatment, and so does not have access to the information sought by Liberty. However, the law requires balancing of an employee's hardships in obtaining or providing discovery against an employer's right to thoroughly investigate and defend claims. *Id*.; AS 23.30.001; AS 23.30.135; *Rambo*; *Granus*. Whatever materials Employee has sent to Dr. McIntosh will likely still be in her file at Dr. McIntosh's office, which could be obtained by a simple request. *Rogers & Babler*. Employee has now had well over five months to respond to Liberty's August 4, 2016 discovery request. *Id*. Employee will be given 20 days from the date of this decision to respond to Liberty's August 4, 2016 request. AS 23.30.001; AS 23.30.135. If Employee fails to comply with this order, her claims may be dismissed. *Id*.; *Rogers & Babler*; *McKenzie*; *Erpelding*.

2) Did the Board Designee abuse his discretion in setting the February 22, 2017 merits hearing?

The Act allows any party, not only an injured worker, to request a hearing on a claim or petition. AS 23.30.110(c). Where an opposition to a hearing request is filed by an adverse party, the Act directs the Board or Board Designee *shall* hold a prehearing conference and set a hearing date. *Id*. This language is mandatory, not discretionary. *Id*.

Alaska National filed an ARH on September 6, 2016 requesting a hearing on Employee's August 15, 2013 claim. Employee is correct in her contention *O'Brien III* granted Employee six months, or until April 5, 2017, to request a hearing. *O'Brien III* did not, as Employee urges, bar Alaska National or Liberty from requesting a hearing. Employee's contention the February 22, 2017 hearing should not be set, because *O'Brien III* grants Employee until April 5, 2017 to request a hearing is a misreading of that decision. Because the Board Designee at the October 20, 2016 prehearing conference correctly applied AS 23.30.110(c), which requires a hearing be set upon a party's request, there was no abuse of discretion and this is not a basis for cancelling the February 22, 2017 hearing. *Id*.; AS 23.30.001; AS 23.30.135; 8 AAC 45.065(e).

Employee next contends the October 20, 2016 prehearing conference summary should be corrected to reflect that Employee read Dr. Weiss' October 12, 2016 chart note out loud at the prehearing. Because the October 20, 2016 prehearing was not recorded, this decision has no way of knowing the parties' contentions, positions, or representations on that day. In any event, statements or representations made by a party at a prehearing conference generally are not treated as evidence in cases under the Act. 8 AAC 45.110. A party wishing to rely on medical opinions or records must file them in advance of a hearing accompanied by a medical summary form. 8 AAC 45.052; 8 AAC 45.120. Employee's request to modify the October 20, 2016 prehearing conference summary to reflect Employee's reading of medical records will be denied. *Id*.; AS 23.30.135.

Employee next contends the February 22, 2017 hearing should not have been set because she is unable to prepare. Employee relies on her own testimony, and the opinions of Dr. Weiss in support of this position. Employee also points to her inability to compile her medical records, since she is in Georgia for treatment, rather than home in Alaska where she keeps her records and documents.

Relying on Dr. Sheorn's August 5, 2015 EME report, *O'Brien III* found Employee may suffer from Munchausen's syndrome, a psychiatric factitious disorder, which Dr. Sheorn opined is very severe in Employee's case. This fact could arguably impact Employee's willingness to see this case heard and concluded, and lead her to request repeated continuances in order to prolong the proceedings. AS 23.30.135; *Rogers & Babler*. Employee has presented no convincing evidence contradicting or challenging Dr. Sheorn's opinion, and so Employee's testimony on the issue of her ability to prepare for hearing is given less weight. AS 23.30.122; *Smith*; *Thoeni*.

Dr. Sheorn's opinion is supported by the fact Employee demonstrates a considerable ability to prepare for this case, as evidenced by her numerous pleadings, petitions, and objections, all of which are well-written and organized, show extensive knowledge of the record, and a relatively high degree of familiarity with the Act and regulations. *Id*.; AS 23.30.135; *Rogers & Babler*. As Employee stated in her October 31, 2016 objection, she would be able to sit and prepare for her hearing no sooner than January 12, 2017, a date which has already passed. While Employee

stated she prefers to personally appear at a hearing on the merits, injured workers and other witnesses routinely participate and testify at Board hearings telephonically, and so this concern is untenable as a grounds for additional time. AS 23.30.001; AS. 23.30.135. While the opinions of Dr. Weiss as to Employee's physical condition and Dr. Craig as to Employee's psychiatric state are given some weight, there is substantial evidence in the record Employee should be able to prepare for and present her case at the February 22, 2017 hearing. *Id*.; AS 23.30.122; *Smith*; *Rogers & Babler*; 8 AAC 45.074.

Employee contends she is at a disadvantage because she is not represented by an attorney. But pleadings, briefs, and arguments of *pro se* litigants are interpreted less stringently than those of lawyers. *Coppe*. It is also long-settled that the Board has a duty to assist unrepresented litigants in preserving their claim, and of advising and instructing them how to pursue their rights under the Act. *Richard*. The fact Employee is not represented by an attorney has no prejudicial effect on presenting her case, and is not grounds for continuing the February 22, 2017 hearing. *Id*.; AS 23.30.001; AS 23.30.135; *Rogers & Babler*; 8 AAC 45.074.

3) Should Employee be excused from participation in this case for three months?

As above, Employee relies on her own testimony as well as the opinions of Dr. Weiss in support of her contention she should be excused from all participation in this case for at least three months. As in *O'Brien III*, Employee's concerns over her inability to prepare for hearing must be weighed against an employer's and insurer's due process rights to have a case fairly, efficiently, and finally adjudicated. AS 23.30.001. There is no procedure or legal precedent for granting an indefinite continuance in cases under the Act. *Id*.; AS 23.30.135. Employee has not convincingly shown why additional time should be granted for her to prepare for a hearing on the merits of her case, and the February 22, 2017 hearing will not be cancelled or continued, except for good cause as may arise in the future. *Id*.; *Rogers & Babler*; 8 AAC 45.074.

CONCLUSIONS OF LAW

1) Employee's October 22, 2008 claim will not be dismissed as a sanction for failure to comply with a Board Designee's order.

2) The Board Designee did not abuse his discretion in setting the February 22, 2017 merits hearing.

3) Employee will not be excused from participation in this case for three months.

ORDER

1) Liberty's October 27, 2016 petition to dismiss denied.

2) Employee's October 31, 2016 petition for reconsideration or modification of a Board Designee's discovery order and for protective order is denied.

3) Employee has 20 days from receipt of this decision to respond to Liberty's August 4, 2016 discovery request seeking any and all written materials Employee may have sent to her treating physician, Dr. McIntosh.

4) If Employee fails to comply with this decision and order, her claims may be dismissed.

5) The hearing currently scheduled for February 22, 2017 will not be cancelled or continued, except for good cause as may arise.

Dated in Anchorage, Alaska on January 19, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Matthew Slodowy, Designated Chair

/s/
Dave Kester, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accordance with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of CHARLAYNE O'BRIEN, employee / claimant; v. CENTRAL PENINSULA GENERAL, employer; WAUSAU UNDERWRITERS INSURANCE COMPANY, insurer / defendants; Case No. 200701733M; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on January 19, 2017.

/s/_____
Pamela Hardy, Office Assistant